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In The
Supreme Court of the United States

October Term 1983

CITY OF ROCHESTER,

Respondent,

vs.

ANGELO CHIARELLA, REAL ESTATE BOARD OF
ROCHESTER, NEW YORK, INC., and MIDTOWN
HOLDINGS CORP., each individually and on behalf of all
payers of real property taxes to the City of Rochester, for the
fiscal years 1974-75 through 1977-78,

Class Defendants,

QUALITY PACKAGING SUPPLY CORP., ARTHUR N.
BAILEY, MC CRORY CORPORATION and RICHARD
W. KATOS (Subclass B Representatives).

Appellants-Petitioners,

ANGELO CHIARELLA,

Appellant,

STEPHEN J. and CHARLENE SERCU,

Respondents.

**PETITION FOR CERTIORARI — CLAIM FOR
REFUND OF TAXES UNCONSTITUTIONALLY
ASSESSED AND COLLECTED**

FROM THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The paramount question presented for review is this: Did the courts of New York, by requiring a written "protest" by a taxpayer of the City of Rochester, New York as a prerequisite for claiming a refund of an admittedly unconstitutionally assessed tax on real property, reject or ignore the rule of this Court first set forth in *Marbury v. Madison*, 1 Cr. 137, 179; 2 L.Ed. 60, 74 (1803), that "a law repugnant to the constitution is void"?

A second substantial issue is whether by requiring a taxpayer to protest at the time of his payment of an unconstitutional tax, the state has deprived that taxpayer of due process.

A third substantial issue is whether the presumption, indulged in by the court below, that payment of an invalid tax without protest constitutes a voluntary payment or a gift of the payment contravenes the substantive law governing gifts.

**PARTIES TO THE PROCEEDING IN
THE STATE OF NEW YORK COURT OF APPEALS**

The parties are set forth in the caption of this class action.

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TABLE OF AUTHORITIES

Cases:

- Angelone v. City of Rochester*, 72 A.D.2d 445 (1980),
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- City of Rochester v. Chiarella*, 86 A.D.2d 110 (1982),
aff'd 58 N.Y.2d 316 (1983)
- Cleveland Board of Education v. LaFleur*, 414 U.S. 632,
39 L.Ed.2d 52 (1974)
- First National City Bank v. New York*, 36 N.Y.2d 87,
365 N.Y.S.2d 493 (1975)
- Heiner v. Donnan*, 285 U.S. 312, 76 L.Ed.2d 772 (1932)
- Hurd v. City of Buffalo*, 41 A.D.2d 402 (1973), aff'd 34
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- Marbury v. Madison*, 1 Cr. 137, 2 L.Ed. 60 (1803)
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- Mercury Machine Importing Corp. v. City of New
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- Oquendo v. Insurance Company of Puerto Rico*, 388
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- San Antonio School District v. Rodriguez*, 411 U.S. 1,
36 L.Ed.2d 16 (1972)
- Saratoga State Waters Corp. v. Pratt*, 227 N.Y. 429
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- Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23
L.Ed.2d 349 (1969)

- Title Guarantee & Trust Co. v. City of New York*, 265 App.Div. 304 (1942), aff'd 290 N.Y. 910 (1943)
- Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973) . . .
- Waldert v. City of Rochester*, 90 Misc.2d 472 (1977), aff'd 61 A.D.2d 147 (4th Dept., 1978), modified 44 N.Y.2d 831 (1978)

Other Authorities:

- The American Heritage Dictionary*, Second College Edition, Houghton Mifflin Company, 1976
- Webster's Seventh New Collegiate Dictionary*, G & C Merriam Co., Publishers, 1971

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CITATIONS OF OPINIONS BELOW

The opinion of the New York Court of Appeals decided March 29, 1983 (*City of Rochester v. Chiarella*, 58 N.Y.2d 316) affirmed the order of the Appellate Division of the Supreme Court, Fourth Department (*City of Rochester v. Chiarella*, 86 A.D. 2d 110) which overruled the order of the Special Term of the Supreme Court of the State of New York held in and for the County of Monroe (unreported).

The opinion of the Supreme Court, Monroe County, New York, with pertinent order, the opinion of the Appellate Division, with pertinent order, and the opinion of the Court of Appeals are set forth in the Appendix hereto as Exhibits "I" through "V", respectively.

There was no order issued by the Court of Appeals inasmuch as it answered in the affirmative the question certified by the Appellate Division: "Was the order of this Court entered April 12, 1982, properly made?" Therefore, the order of the Appellate Division entered April 12, 1982 remains the final order in the case.

JURISDICTIONAL STATEMENT

The decision of the New York Court of Appeals was made March 29, 1983 (Exhibit V of Appendix, page A-19). The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

A. Preliminary Statement

Presented in this petition is the issue of whether, as a matter of constitutional law, the New York Court of Appeals erred in determining that, absent written protest, taxpayers of the City of Rochester (and other cities in New York faced with the same issue) are not entitled as a matter of right to a refund of taxes declared by the Court of Appeals to be unconstitutional.

The case is a defendant class action commenced by the City of Rochester against all of its real property taxpayers who paid such taxes during the City's four fiscal years, 1974-75 through 1977-78. It arose as a result of the decision in *Hurd v. City of Buffalo*, 41 A.D.2d 402 (4th Dept., 1973), *aff'd* 34 N.Y.2d 628 (1974); *Waldert v. City of Rochester*, 90 Misc.2d 472 (1977),

aff'd 61 A.D.2d 147 (4th Dept., 1978), modified 44 N.Y.2d 831 (1978); and *Angelone v. City of Rochester*, 72 A.D. 445 (4th Dept., 1980), aff'd 52 N.Y.2d 982 (1981), which determined that the City exceeded its constitutional tax limit and that it owed refunds of illegally collected taxes to its taxpayers.

The instant action was commenced by the City in June of 1980 after the decision of the Appellate Division but prior to the Court of Appeals decision in the *Angelone* case. The class action was commenced by the City as a defendant class action to ward off the flood of individual lawsuits anticipated by the Appellate Division's decision requiring refunds. Hopeful that the Court of Appeals would reverse the Appellate Division's decision, the City originally sought a declaration that the tax refunds need not be made, or alternatively, a determination as to the rights and liabilities of the respective parties. The defendant taxpayers in turn served an answer and counterclaim seeking refunds for the four fiscal years in question.

According to estimates by the City, approximately \$48,000,000 of the total in excess of \$103,000,000 of taxes illegally collected came from persons who failed to file any formal protest (194).¹

In the meantime, the Court of Appeals affirmed the decision of the Appellate Division in *Angelone*, and refunds of real property taxes were ordered.

In the instant case, Special Term of the Supreme Court of the State of New York then entered an order certifying the class action. The court identified a threshold issue in the case, viz: whether taxpayers were required to have made contemporary written "protest" to the City in paying their taxes in order to obtain a refund.

¹Page references to the Record on Appeal to the the New York Court of Appeals.

Specifically, Special Term's order of October 9, 1981, certifying the class action, provided that the "protest issue" should be set down for "threshold and final determination herein, including all appeals, prior to consideration of all remaining issues" (34). Promptly thereafter the court heard arguments on the protest issue and rendered a decision on October 21, 1981 (Exhibit I of Appendix, page A-1) determining that protest was not legally required to entitle taxpayers to a refund of such taxes. An order and judgment to this effect was entered on November 4, 1981 (Exhibit II of Appendix, page A-5). This order and judgment was appealed to the Appellate Division, where, upon the unanimous decision (Exhibit III of Appendix, page A-8) and order (Exhibit IV of Appendix, page A-17) of that court, it was reversed.

The Appellate Division's decision specifically held that taxpayers who failed to make appropriate written protest to the City of Rochester "are not entitled as a matter of legal right to a tax refund for the years in question," thus effectively dismissing their counterclaims for refunds (Exhibit III of Appendix, page A-8). An order of the Appellate Division was entered thereon on April 12, 1982 (Exhibit IV of Appendix, page A-17).

Thereafter, these petitioners made a motion in the Appellate Division, Fourth Department, to be granted leave to appeal to the Court of Appeals in their individual and representative capacities. By order dated and entered July 9, 1982, the Appellate Division, Fourth Department, granted leave to appeal (607). In their petition for leave to appeal, these petitioners specifically raised the federal issue of the constitutionality of the decision of the Appellate Division and the rule of *Marbury v. Madison*, *supra*, (as these petitioners had upon the appeal to the Appellate Division and on the hearing at Special Term of the Supreme Court).

B. *The Background of the Class Action*

As mentioned above, this class action arose from the background of decisions of the Court of Appeals which declared certain real property tax levies made by the City to be in violation of the New York Constitution. Following the Appellate Division's decision in *Angelone* in February of 1980, the then net effect of these cases was to create claims against the City for the refund of real property taxes for four fiscal years, approximating one hundred three million dollars (193-194). More than 70,000 parcels had been subject to the illegal taxes (97), thus creating many thousands of claims. Of these claims, a large number belonged to the "average single family home . . . assessed at \$5,000" in amounts of "approximately \$700 each" (199).

Added to these unique facts was a further extraordinary element. Many, if not most, of those persons who possessed claims against the City also continued to pay real property taxes to the City. Since real property taxes constitute by far the great bulk of the City's sources of revenue and its only likely source for the payment of refunds (197-199), persons with claims were faced with becoming the very source for their own refunds.

During the pendency of the *Angelone* case before the New York Court of Appeals, and on the eve of the expiration of the statute of limitations for the recovery of 1974 tax refunds,² the City brought this defendant class action against its taxpayers to fend off a multiplicity of lawsuits, to bring all claimants before the same forum and to obtain a final determination of everyone's rights and liabilities (102-103, 194). The City's

²An action for refunds of illegally paid taxes is one for "moneys had and received" for which a six year statute of limitations is applicable. *First National City Bank v. New York*, 36 N.Y.2d 87, 365 N.Y.S.2d 493 (1975). The 1974-75 levy was made on July 1, 1974. The defendants' counterclaims were interposed and the New York Supreme Court's order certifying the class was entered on June 26, 1980, a few days short of six years from the date of the original levy.

complaint expressed the fear that hundreds, if not thousands, of actions would be commenced against it for refunds in a variety of courts, and that it would be put to substantial expense and inconvenience in defending multiple actions. At the time, however, the City apparently hoped to defeat the refund claims in its pending appeal by reversing the Appellate Division's decision in *Angelone* in the New York Court of Appeals. In the event that the *Angelone* decision was affirmed, the City's complaint sought in the alternative to propose a refund plan to the New York Supreme Court for its approval.

In naming the defendants that it did, the City's complaint focused on the manner in which each had handled the issue of protest raised by the *dicta* in the *Hurd*, *Waldert* and *Angelone* cases: the defendant, Midtown Holdings Corp., with an aggregate claim of \$609,454.93, had filed a formal letter of protest; the defendant, Real Estate Board of Rochester, New York, Inc., with an aggregate claim of \$11,228.14, had simply noted "Paid Under Protest" on its check for taxes; and homeowner, Angelo Chiarella, with an aggregate claim of \$1,439.42, had failed to lodge any written protest at all (121-131).

In response to the City's complaint, the defendants interposed counterclaims for aggregate refunds on their own behalf totaling in excess of \$600,000 and on behalf of all class members totaling in excess of \$106,000,000 (121-131).

At the outset, the class action was provisionally certified, and the New York Supreme Court issued stays to prevent the commencement of additional lawsuits against the City. It also issued a stay to hold matters in abeyance in the class action itself pending determination by the New York Court of Appeals in the City's appeal of the *Angelone* case.

The Court of Appeals affirmed *Angelone* in February of 1981, and the City's liability for the four years in question was established. Special Term accordingly ordered the City to file a refund plan in accordance with the alternate prayer for relief contained in its complaint (184-186).

On August 3, 1981, the City served its refund plan — essentially a settlement proposal (192-201). The City proposed to refund one-half of the taxes illegally collected from all taxpayers who paid them whether they protested or not. The only taxpayers to be exempted from this aspect of the plan were Rochester Telephone Corporation and Rochester Gas & Electric Corporation, both public utilities regulated by the Public Service Commission. They were to receive 100% refunds over a five-year period, funded by a special gross receipts utility tax to be imposed upon them which the City was then urging the State Legislature to enact.³

The City's refund proposal stressed the financial hardship which might be imposed upon its taxpayers if the refunds were required to be paid in full. The plan noted that money to pay a full refund might be obtained by borrowing through the sale of bonds and notes, but asserted that the interest costs of such borrowing would ultimately require that the average taxpayer would pay more money in real property taxes to fund the refunds than he would receive in actual refunds (199).

After the filing of the City's refund proposal, Special Term proceeded to the consideration of class certification and the procedural course of the litigation. Finding that "there may be limited resources and legal means for repayment and that most claimants may be required to pay refunds to themselves, in effect, through higher taxes" (69) by order dated October 9, 1981, the New York Supreme Court certified the class action, appointed class representatives, and set down the issue of whether lack of protest could bar the right to recovery by non-protesters for threshold determination (69, 25-39). By the New York Supreme Court's order, all other matters in the class action were to be held in abeyance pending the resolution of the protest issue through a decision by the New York Court of Appeals.

³This legislation was subsequently enacted. Laws 1982, Ch. 27; City of Rochester Local Law 4 of 1982.

C. *New York Supreme Court Special Term's Protest Decision*

Shortly thereafter, New York Supreme Court Special Term heard argument on the protest issue and determined that protest was unnecessary to the recovery of refunds in the context of this case (88-93) (Exhibit I of Appendix, page A-1). In summary, the New York Supreme Court determined:

1. That the function of protest is to provide notice to the municipality of the potential illegality of the tax and is not a protection to taxpayers;

2. That the taxes here created automatic real property liens and carried penalties which together constituted duress, so that payments of illegal taxes were involuntary and could be recovered regardless of protest;

3. That the requirement of protest unfairly discriminates between the more knowledgeable or affluent taxpayers who could afford tax counsel and those who could not;

4. That the *Hurd* case supplied the City with sufficient notice of the illegality of its taxing scheme to fulfill the notice function of protest;

5. That in reality protest is a meaningless legal technicality which should not form a basis of discrimination between taxpayers.

Having found that protest was not a legal impediment to recovery, Special Term of the New York Supreme Court declined to reach an alternative issue raised by the City relating to the applicability of General City Law §20(5). The City had argued (a) that it had no obligation to repay non-protesters, but alternatively (b) that it could implement its 50% refund plan in recognition of a moral or equitable obligation to the non-protesters pursuant to authority given under General City Law §20(5). The determination of Special Term that protest was not legally required for recovery necessarily mooted the City's alternative argument. An order was entered thereon on November 3, 1981 (84) (Exhibit II of Appendix, page A-5).

Both the City and the Sercus appealed Special Term's determination and order to the Appellate Division, Fourth Department. This appeal was heard and determined by decision dated and entered April 12, 1982 (Doerr, J.) (628-636) (Exhibit III of Appendix, page A-8).

D. *The Appellate Division's Protest Decision*

Relying primarily on *dicta* in *Hurd*, *Waldert* and *Angelone*, the Appellate Division held that, "absent appropriate written protest," non-protesters "are not entitled as a matter of legal right" to tax refunds in this case (633). An order reversing the order of the New York Supreme Court Special Term was entered April 12, 1982 (637) (Exhibit III of Appendix, page A-8).

The Appellate Division also restructured the classes in the action, noting that because of limited available funds for refunds and especially because of its determination concerning protest, protesters might now "be set against non-protesters" (635). In a separate order, also issued on April 12, 1982, the Appellate Division segregated all protesters into a newly defined "Subclass A" and all non-protesters into a newly defined "Subclass D"⁴ (639-641).

E. *The Appeal to the New York Court of Appeals*

Thereafter, in the New York Supreme Court, Special Term appointed provisional class representatives and counsel for the newly defined Subclasses A and D for the express purpose of prosecuting and defending an appeal to the Court of Appeals of the protest order (625-627).

Petitioners, who had raised the federal issue of the unconstitutionality of the requirement of protest, both at Special Term and before the Appellate Division, continued as a separate Subclass B.

⁴This order also dealt with an appeal filed by Rochester Gas and Electric Corporation and Rochester Telephone Corporation, not relevant here. It was referred to by the parties and the New York Supreme Court as "Appeal No. 1"

By order of the Appellate Division made and entered July 9, 1982 (607), the Appellate Division granted to these petitioners leave to appeal to the Court of Appeals and certified to that court the question of whether the order of the Appellate Division was properly made.

Mr. Chiarella then also sought leave to appeal from the Appellate Division, Fourth Department, to the New York Court of Appeals, which leave was granted by an order entered July 9, 1982 (605) and by amended order of July 27, 1982 (602-603).

At all stages, petitioners here, who were respondents in the Appellate Division and appellants in the New York Court of Appeals, argued that while the arguments raised by counsel for Mr. Chiarella, as class representative for the "non-protesters", were meritorious, they would be academic if the courts held that "protest", a judicially created pre-requisite to a taxpayer's recovery of an unconstitutional tax, was itself repugnant to the United States Constitution and, therefore, void as set forth in the 1803 landmark case of *Marbury v. Madison*, *supra*.

The Court of Appeals in an opinion, dated March 29, 1983 (Exhibit V of Appendix, page A-19), held that the order of the Appellate Division should be affirmed and that the certified question should be answered in the affirmative.

STAGES AT WHICH THE CONSTITUTIONAL QUESTION WAS RAISED

Petitioners interposed, and set forth in briefs at each of the stages below, the argument that "protest" — or any other precondition, whether imposed judicially or legislatively, to recovery of an unconstitutional or invalid tax was rendered void by the doctrine established by the Court in the year 1803 in *Marbury v. Madison*, *supra*.

It was pointed out that Chief Justice Marshall had specifically addressed the question of a taxpayer's attempt to recover an illegal tax and had observed that inasmuch as any

"law repugnant to the constitution is void", there could be no impediment to the taxpayer's recovery of the amount of the invalid tax he had paid. *Marbury v. Madison*, *supra*, 1 Cr. 137, at p. 179.

ARGUMENT

POINT I

Protest is not prerequisite to recovery by a taxpayer of an unconstitutionally levied tax.

If a legislative act is unconstitutional, it is void.

"... a law repugnant to the constitution is void."
Marbury v. Madison, 1 Cr. 137, 179; 2 L.Ed. 60, 74 (1803).

While the requirement of "protest" is a judicial rather than a legislative act, the import of the rule is the same.

Interestingly, one of the examples of the effect of an unconstitutional enactment cited by Chief Justice Marshall in *Marbury v. Madison* to illustrate this basic principle relates to an unconstitutional tax. At page 179 of 1 Cr. (page 74 of 2 L.Ed.), he said:

"It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?"

The New York State Court of Appeals has held similarly.

"An unconstitutional or void statute is not a law; it compels no one, binds no one, protects no one."
Saratoga State Waters Corp. v. Pratt, 227 N.Y. 429, 447 (1920).

If it "compels no one", then how can a taxpayer be required to protest before recovering the amount of the tax un-

constitutionally assessed? If it "protects no one", then how can the City be heard to argue that a failure to protest when paying an unconstitutional tax is a defense to a taxpayer's "suit instituted to recover it", to use Chief Justice Marshall's words?

We submit that the proper doctrine should recognize that a tax that is unconstitutional is unconstitutional and void in toto, and not — to borrow the old saw about the expectant mother — just a little bit unconstitutional.

POINT II

To require protest as a prerequisite to recovery of an unconstitutional tax denies due process.

A fundamental of Fourteenth Amendment procedural due process is a guarantee against the deprivation of liberty or property without notice of the taking and a right to be heard, and this guarantee applies whenever a state or its subdivision seeks to remove, alter or deny a property interest recognized by the state. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339-340; 23 L.Ed.2d 349, 352-353 (1969).

That taxpayers who paid illegal taxes have a property right in the amounts so paid has clearly been recognized in New York in the decision of the Court of Appeals from which this petition is taken and in prior cases. *Hurd v. City of Buffalo*, 41 A.D.2d 402, 405 (1973), aff'd 34 N.Y.2d 628 (1974); *Title Guarantee & Trust Co. v. City of New York*, 265 App.Div. 304 (1942), aff'd 290 N.Y. 910 (1943).

To impose the requirement of "protest" as a prerequisite to recovery of such tax, however, is to deprive the taxpayer of his right to recover an unconstitutional assessment without the benefit of a minimal notice and hearing. Instead of providing the notice and right to be heard which due process requires, the protest rule places the onus on the taxpayer to be aware of the illegality and act when he pays the unconstitutional tax.

Further, the protest rule violates due process by creating an arbitrary classification — the non-protesters as opposed to protesters.

The protest requirement is analogous to the various statutes and ordinances which require a person to give notice of a claim against a state or municipal entity. These have occasionally been challenged on due process grounds as arbitrary in that they establish unreasonable governmental classifications.

The applicable rule of law, under the traditional equal protection analysis, inquires whether a legislative classification is rationally related to a legitimate governmental interest. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed.2d 16 (1972); *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393 (1960). Governmental interests which have been deemed sufficient to sustain the notice requirement include giving the municipality an opportunity to investigate the facts underlying the claim, discouraging unfounded claims, and allowing the municipality to create reserves for the claim in its annual budget. See *Oquendo v. Insurance Company of Puerto Rico*, 388 F.Supp. 1030, 1035 (D.P.R. 1974).

Protest must be filed simultaneously with payment of taxes in order to be effective, and the rule is therefore more onerous than the notice statutes, which allow a period of time for the giving of notice. Unlike the notice-of-claim statutes, however, there is no legitimate governmental interest supporting the requirement of protest in cases like the present case. There are no facts to investigate or other circumstances which would result in prejudice to the City if prompt notice of refund claims are not given via protest. And the rationale that the City of Rochester required notice so that it might make budgetary provision for refunds was expressly declared inapplicable by the Court of Appeals in *Waldert v. City of Rochester*, 44 N.Y.2d. 831, 835 (1978), which held that the City had already been put on notice before taxes were paid by the decision in *Hurd v. City of Buffalo*, *supra*.

In short, the only function protest could serve, under the present circumstances, is to protect the municipality's fisc against claims for refunds in substantial amounts. As the New York Court of Appeals in a burst of candor explained in *Mercury Machine Importing Corp. v. City of New York*, 3 N.Y.2d 418 (1957), at pages 426 and 427, the requirement of protest has been erected as a barrier against the valid claims of taxpayers as a practical matter stemming from problems of municipal finance, and not from any solid legal reasoning. Such an arbitrary function is not a legitimate governmental interest.

POINT III

The presumption of the court below that payment of unconstitutional tax by non-protesters was voluntary contravenes the law and due process.

The protest requirement is also unconstitutionally objectionable because it sets up and depends upon the conclusive presumption that the payment of the invalid tax by the non-protesters "must be considered voluntary." See *City of Rochester v. Chiarella*, *supra*, 58 N.Y.2d 316, 326.

Stated differently, but accurately, the court below presumed, in the absence of protest, that the taxpayer intended to make a gift of his tax payment to the City. See page 352 of *Webster's Seventh New Collegiate Dictionary* which defines a gift as: "2: something voluntarily transferred by one person to another without compensation." *The American Heritage Dictionary* (Second College Edition) defines a gift as: "1. Something that is bestowed voluntarily and without compensation" (page 558).

This presumption is not supportable at law.

In New York, as elsewhere, the law governing a "gift" or voluntary payment or transfer — however it may be described — is very clear.

"The law never presumes a gift. To constitute a valid gift there must have been the intent to give and a delivery of the thing. The evidence must show that the donor intended to divest herself of the possession of her property and it should be inconsistent with any other intention or purpose." (Emphasis supplied.) *Matter of Bolin*, 136 N.Y. 177, 180 (1892).

The factual situation cries for the prima facie conclusion that these scores of thousands of taxpayers made their payments in error, not understanding that the assessments were invalid. Certainly there is no showing as yet in this case that they did not intend merely to pay their taxes which, as unsophisticated taxpayers, they assumed they owed. Certainly there is nothing to justify the court's "conclusion" that "the payments must be considered voluntary". *City of Rochester v. Chiarella, supra*, 58 N.Y.2d 316, 326. Indeed the law of New York is just the opposite.

The only conclusion one can reasonably draw from the lack of protest is that this multitude of taxpayers was ignorant of the unconstitutionality of their tax, ignorant of the judicially created rule of protest or not sufficiently informed as to how a protest should be made. This, essentially, is what the justice at Special Term held in his decision (91) (Exhibit I of Appendix, page A-1).

"Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446, 37 L.Ed.2d 63, 68 (1973). That an irrebuttable presumption need not, of course, be expressed in terms such as "Y shall be conclusively presumed from X" is apparent from the nature and purported rationale of the rule. For example, in the case of *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52 (1974), this Court found that the rule requiring pregnant teachers to go on leave five months before giving birth created an illegal irrebuttable presumption that the

teacher was physically unfit to teach after that date. Irrebuttable presumptions are forbidden where the presumption is not necessarily true in fact, and where the state has reasonable alternative means of making the crucial determination. *Vlandis v. Kline*, 412 U.S. 441, 452, 37 L.Ed.2d 63, 71 (1973). Conclusively presuming lack of protest to indicate voluntary payment is a rule which attempts "to enact into existence a fact which here does not, and cannot be made to, exist in actuality, . . ." *Heiner v. Donnan*, 285 U.S. 312, 329, 76 L.Ed.2d 772, 780 (1932). A rule presuming in this case that lack of protest implies voluntary payment is contrary not only to common sense and to the circumstances of the case, but also to due process of law.

Certainly a taxpayer intends no gift. He pays his taxes either because he is a good citizen or because he wishes to avoid penalties and ultimately foreclosure — or both. To hold otherwise, and to impose a requirement that he must protest his payment of an unconstitutional tax to demonstrate that he intended no gift, is to judicially create a prerequisite to his recovery which violates a principle which has been basic in this land since *Marbury v. Madison*, *supra*, which was decided in the year 1803.

In such a case as this, the courts should hasten to assist the taxpayer in his uneven struggle against the government, and not throw outmoded judicial impedimenta in his way.

CONCLUSION

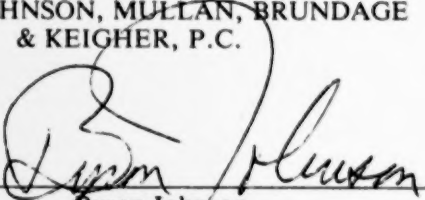
The writ of certiorari should be granted.

Dated: Rochester, New York
June 20, 1983

Respectfully submitted,

JOHNSON, MULLAN, BRUNDAGE
& KEIGHER, P.C.

By: _____

A large, stylized handwritten signature in black ink, appearing to read "Byron Johnson", is written over a horizontal line.

Byron Johnson
(Admitted May 24, 1976)

*Attorneys for Petitioners, Quality
Packaging Supply Corp., Arthur N.
Bailey, McCrory Corporation and
Richard W. Katos*

47 South Fitzhugh Street
Rochester, New York 14614
Telephone: (716) 262-5700

APPENDIX

A-1

**EXHIBIT I
DECISION OF SPECIAL TERM SUPREME
COURT, DATED OCTOBER 21, 1981**

SUPREME COURT

STATE OF NEW YORK

COUNTY OF MONROE

CITY OF ROCHESTER,

Plaintiff,

—vs—

ANGELO CHIARELLA, REAL ESTATE BOARD OF
ROCHESTER, NEW YORK, INC., and MIDTOWN
HOLDINGS CORP., each individually and on behalf of
others similarly situated and collectively on behalf of all
payers of real property taxes to the City of Rochester, for the
fiscal years 1974-75 through 1977-78,

Class Defendants.

Hall of Justice
Rochester, New York

October 21, 1981

PRESIDING:

Honorable Robert A. Contiguglia
Acting Supreme Court Justice

APPEARANCES:

Louis N. Kash, Corporation Counsel
Attorney for City of Rochester

Harter, Secrest & Emery
by Kenneth A. Payment, Esq., of counsel
Attorneys for Class Defendants

David J. Angelone, Esq.
Attorney for Subclass A Defendants

Richard D. Bianchi, R.P.R.
Supreme Court Reporter

EXHIBIT 1

*Decision of Special Term Supreme
Court, dated October 21, 1981*

THE COURT: The Court wishes to express its appreciation to all counsel for the way they have expedited this case and for the scholarly briefs submitted on the threshold issue of protest.

By order dated October 9, 1981, this Court established various classes and a Bar liaison committee to insure that all real property taxpayers in the City of Rochester for the fiscal years 1974-75 through 1977-78 were represented and their rights protected. The decision of this Court must insure justice, both legal and equitable.

The issue before the Court is whether all property taxpayers for the years in question are entitled to refunds, or only those who formally protested their tax payments.

The case law in this state has required some form of protest where real property taxes are paid voluntarily. Where property taxes are paid under duress or involuntarily, protest is not required. The purpose of protest is not really to protect the taxpayer but to place the municipality on notice that a taxpayer challenges the legality of the tax and seeks a refund for the alleged illegal taxes. But times and philosophies have changed and case law is one area that courts have the power to change as times warrant. Obliter dicta and even the dissenting opinions of the past have become the law of the case today.

In this case, the tax levy imposed by the City immediately became a lien on real property, and if those taxes were not paid by a certain date, penalties automatically attached and, likewise, became a lien. There is no question but this lien affects not only the marketability

EXHIBIT I

*Decision of Special Term Supreme
Court, dated October 21, 1981*

of the property but also its mortgageability. If the taxes remain unpaid for a certain period, the property owner loses title through tax foreclosure or mortgage foreclosure. In essence, property owners must pay their taxes on time, whether those taxes be legal or illegal or suffer the consequences of penalties or worse, loss of ownership. By no stretch of the imagination is such a payment voluntary or without duress. To require a formal protest certainly discriminates between the more knowledgeable property owners who are able to keep abreast of tax and case laws because they can afford counsel or tax consultants, and the average homeowner who has little or no knowledge how to protest, let alone the meaning of protest, nor the financial ability to retain counsel or tax consultants to advise whether a property tax is legal or illegal. Besides, a notice of protest does not advise the City as to any particular grounds for challenge of a tax. It is a blanket statement that has no meaning. In this day and age, it is logical to assume that everyone pays a property tax involuntarily or under protest, and certainly any statement on a tax bill or payment check which signifies "protest" is meaningless, especially since those property owners who do this do it as a matter of course.

If the City tax was illegal, which it was, then the taxes collected above the constitutional limit were illegally appropriated, and those taxpayers who were required to pay those illegal taxes should be entitled to refunds regardless of whether they did or did not protest.

Assuming, in arguendo, that some form of protest was required, such protest was not required under the circumstances of this case.

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EXHIBIT I
Decision of Special Term Supreme
Court, dated October 21, 1981

Hurd versus City of Buffalo was decided in early 1974, long before the City of Rochester levied its tax for the fiscal year 1974-75. That case clearly put all municipalities on notice, including the State Legislature. When the latter attempted to circumvent Hurd by special statute, there was no reason to expect any other decision than that propounded in Waldert versus City of Rochester. Although Hurd and Waldert decisions were some four years apart, the court's reasoning in both cases was the same. The City of Rochester did not heed the court's dictates and cannot now hide behind the cloak of protest for relief. The issue becomes meaningless.

Finally, the Court is well aware of section 20 of the General City Law. However, this Court is not passing on the validity of the City's action. The City is to be commended for its position to grant relief to all property taxpayers for the years in question but this issue should be argued and decided on appeal.

The issue of protest is before the Court and must be decided once and for all. It is, therefore, the decision of the Court that notice of protest was not required and all property owners who paid illegal property taxes to the City of Rochester for the fiscal years 1974-75 through 1977-78 are entitled to share in refunds.

That, gentlemen, is the extent of my decision. Mr. Payment, as counsel for the general class, you are to submit the order to the Court, and, gentlemen, in accordance with my decree of October the 9th, I will ask that if this decision is appealed that it be done so expeditiously.

MR. PAYMENT: Thank you, Your Honor.

* * * * *

EXHIBIT II
ORDER AND JUDGMENT OF SPECIAL TERM,
DATED NOVEMBER 3, 1981

I CERTIFY that this copy has been compared by me with the original and found to be a true and complete copy.

/s/ KENNETH A. PAYMENT, Attorney.

At a Special Term of the Supreme Court, held in and for the County of Monroe, at the Hall of Justice, in the City of Rochester, New York, on the 21st day of October, 1981.

PRESENT: HONORABLE ROBERT A. CONTIGUGLIA,
Acting Justice of Supreme Court, Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF MONROE

CITY OF ROCHESTER,

Plaintiff,

VS

ANGELO CHIARELLA, REAL ESTATE BOARD OF ROCHESTER, NEW YORK, INC., and MIDTOWN HOLDINGS CORPORATION, each individually and on behalf of other similarly situated and collectively on behalf of all payers of real property taxes to the City of Rochester, for the fiscal years 1974-75 through 1977-78,

Class Defendants.

ORDER AND JUDGMENT
Index No. 6523/80

And Certain Other Actions Listed in Exhibits A and B hereto.

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EXHIBIT II
*Order and Judgment of Special Term,
dated November 3, 1981*

By Order dated and entered on October 9, 1981, this Court, having permanently certified this as a class action and having set down the following issue:

Whether persons who paid their real property taxes to the City of Rochester for the fiscal years 1974-75 through 1977-78 without noting in writing that they protested the payment of such taxes, are nevertheless entitled to a refund of such portion of these taxes as have been found to have been illegally collected by the City of Rochester.

for threshold and final determination, including all appeals, prior to the consideration of all remaining issues herein,

NOW, upon all pleadings, papers, orders and proceedings heretofore had herein and specifically referred to in the Court's Order dated and entered October 9, 1981, and after hearing Harter, Secrest & Emery, Kenneth A. Payment, Esq., of counsel, on behalf of the General Class Representatives herein; Louis N. Kash, Esq., Corporation Counsel, on behalf of the City of Rochester; and David J. Angelone, Esq., on behalf of *Subclass A* herein; and after having considered but not passed upon the arguments of counsel regarding the availability and adequacy of General City Law §20(5) as an alternative for authorizing payment of tax refunds to non-protestors as a matter of equity; and upon due deliberation and upon this Court's oral decision of October 22, 1981, transcribed and filed herewith; it is hereby:

ORDERED, ADJUDGED, DECLARED AND DECREED that all those individuals, corporations or other persons or entities who paid to the Plaintiff City of Rochester, for the City's fiscal years 1974-75 through 1977-78, real property taxes declared unconstitutional in *Waldert v. City of Rochester*, 44 N.Y.2d 831 (1978) and *Angelone v. City of Rochester*, 52

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EXHIBIT II

*Order and Judgment of Special Term,
dated November 3, 1981*

N.Y.2d 982 (1981), without noting in writing that they protested the payment of such taxes are nevertheless entitled as a matter of legal right to a refund of such unconstitutional taxes. The percentage by which the City's real property tax levy in each fiscal year exceeded the constitutional tax limit is as follows:

1974-75	28.69%
1975-76	29.19%
1976-77	30.89%
1977-78	29.46%

Dated: November 3, 1981

/s/ ROBERT A. CONTIGUGLIA
Honorable Robert A. Contiguglia
Acting Justice of Supreme Court

EXHIBITS A AND B

Lists of 343 cases commenced by taxpayers against the City of Rochester for recovery of unconstitutionally assessed real estate taxes for the years 1974-75 through 1977-78 and the names of their counsel which were either dismissed (Exhibit A) or consolidated (Exhibit B), by reason of the certified class action, are omitted.

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EXHIBIT III
DECISION OF APPELLATE DIVISION,
FOURTH DEPARTMENT, DECIDED APRIL 12, 1982

THIS OPINION IS UNCORRECTED AND SUBJECT
TO REVISION BEFORE PUBLICATION IN THE
NEW YORK REPORTS

SUPREME COURT
APPELLATE DIVISION

STATE OF NEW YORK
FOURTH DEPARTMENT

City of Rochester,

Respondent,

—vs—

Angelo Chiarella, Real Estate Board of Rochester, New York,
Inc., and Midtown Holdings Corp., each individually and on
behalf of all payers of real property taxes to the City of
Rochester for the fiscal years 1974-75 through 1977-78,

Defendants

Stephen J. and Charlene Sercu,

Appellants.

Rochester Gas and Electric Corporation,

Appellant,

—vs—

City of Rochester,

Respondent.

Rochester Telephone Corporation,

Appellant,

—vs—

City of Rochester,

Respondent.

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EXHIBIT III
Decision of Appellate Division,
Fourth Department, Decided April 12, 1982

City of Rochester, —

Appellant,

—vs—

Angelo Chiarella, Real Estate Board of Rochester, New York,
Inc., and Midtown Holdings Corp., each individually and on
behalf of all payers of real property taxes to the City of
Rochester, for the fiscal years 1974-75 through 1977-78,

Respondents,

Stephen J. and Charlene Sercu,

Appellants.

#48/1982
Appeal No. 2

ARGUED: January 13, 1982

DECIDED: April 12, 1982

PRESENT:

HON. MICHAEL F. DILLON, Presiding Justice

HON. STEWART F. HANCOCK,

HON. JOHN H. DOERR,

HON. M. DOLORES DENMAN,

HON. REID S. MOULE, Associate Justices

Appeals from Orders of Supreme Court, Erie County, Con-
tiguglia, J. — Tax Refund.

APPEARANCES:

LOUIS N. KASH, ESQ.

Corporation Counsel

440A City Hall

Rochester, New York 14614

Attorney for City of Rochester

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EXHIBIT III
*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

NIXON, HARGRAVE, DEVANS & DOYLE
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Rochester, New York 14602
Attorneys for Rochester Gas & Electric
& Rochester Telephone Corp.
(Michael Tomaino, Esq., of counsel)

HARTER, SECREST & EMERY
700 Midtown Tower
Rochester, New York 14604
Attorneys for General Class Respondents
(Kenneth Payment, Esq., of counsel)

DAVID J. ANGELONE, ESQ.
3621 Lake Avenue
Rochester, New York 14612
Attorney for Subclass A Appellants Sercu

JOHNSON, MULLAN, BRUNDAGE & KEIGHER, P.C.
47 South Fitzhugh Street
Rochester, New York 14614
Attorneys for Subclass B Representatives, Amicus Curiae
(Byron Johnson, Esq., of counsel)

DOERR, J.:

In *Angelone v City of Rochester* (72 AD2d 445, affd 52 NY2d 984), we held that Ordinance No. 79-307 which was adopted by the City of Rochester in order to establish a special capital fund to pay the tax refunds which were mandated by *Waldert v City of Rochester* (44 NY2d 831, modfg 61 AD2d 147) was unconstitutional. A direct refund of excess property taxes collected for the fiscal years 1974-1978 was ordered.

EXHIBIT III

*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

Anticipating the litigation that was sure to follow our decision, the City of Rochester commenced this class action on June 26, 1980 against certain named individuals as representatives of all payers of real property taxes to the City for the fiscal years 1974-1979. The City sought declaratory relief establishing the rights and liabilities of all the parties in the class action and requested the court to direct a method of payment to those entitled to a refund according to a plan to be proposed by the City. Numerous actions for tax refunds had already been commenced by taxpayers when the instant class action was commenced and literally hundreds more were commenced thereafter.

Two orders issued by the Justice specially assigned to this case are the subject of this appeal. In the first order entered October 9, 1981 [Certification Order], Special Term: (1) permanently certified the action as a class action; (2) appointed a representative of the General Class which was described as including all persons or entities who paid real property taxes to the City at any time from 1974 to 1978; (3) established four subclasses within the General Class; (4) appointed the Harter, Secrest and Emery law firm to represent the General Class and appointed various Rochester law firms to represent the four subclasses; (5) dismissed approximately 311 individual actions because they were filed after the court took jurisdiction over the General Class; and (6) consolidated all actions which were commenced prior to the class action. This order also directed that prior to resolution of any other issues, the parties were to litigate the threshold issue of whether those taxpayers who paid illegal taxes without written protest were nevertheless entitled to a tax refund.

From this order Rochester Gas and Electric and Rochester Telephone Corp. (Utilities) and the representatives of Subclass

EXHIBIT III

*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

A appeal. Rochester Gas and Electric and Rochester Telephone Corp. were the only two entities included within Subclass D. Subclass A was defined as representing those taxpayers who paid their taxes under some form of written protest and who challenge the right of non-protestors to obtain tax refunds in whole or in part. For the reasons which follow, we modify and remit for further proceedings insofar as the October 9, 1981 order is concerned.

In the second order appealed entered November 4, 1981, Special Term decided the threshold issue which it framed in the October 9, 1981 order. Special Term determined that non-protesters, i.e., those taxpayers who paid their tax without protest, are legally entitled to refunds and that formal written protest was unnecessary. From this order both the City of Rochester and representatives of Subclass A appeal. We reverse this order.

First of all, on the issue of protest, the law is clear that a taxpayer is entitled to a refund for the payment of illegal taxes only if he can show that the payment was either made under protest or was otherwise involuntarily made (*Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418, 424-425). The need for appropriate protest in tax refund cases is well established and has been reiterated time and again by this court and by the Court of Appeals and needs no elaboration here. In *Hurd v Buffalo* (41 AD2d 402, 406, affd 34 NY2d 628), the fountainhead of all recent tax refund litigation, we held that the City of Buffalo "would be liable only for those taxes paid under protest." Similarly, in *Angelone* (72 AD2d 445, 449, supra), we stated that "only those taxpayers who paid their taxes 'under protest' are legally entitled to a refund * * *." In *Waldert v City of Rochester* (44 NY2d 831, 835, modfg 61 AD2d 147, cert den 439 US 922), the Court of Appeals stated

EXHIBIT III

*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

that "the plaintiff * * * is entitled to establish its rights to repayment of real property taxes paid in excess of the constitutional limitation if such taxes were paid under appropriate protest."

Formal written protest is not necessary if the taxes were paid under compulsion or duress which has been described as payment made "where *present* liberty of person or *immediate* possession of needful goods is threatened by nonpayment of the money exacted * * * (Mercury Mach. Importing Corp. v City of New York, 3 NY2d 418, 425; *supra* [emphasis added] see Adrico Realty Corp. v City of New York, 250 NY2d 29, 33-34, 39-40). In our view the tax payments at issue here were not made under duress. There was no immediate threat to the possession or use of the real property except that a lien was routinely created against the property until the tax was paid. If the threat to a taxpayer is not immediate, the subsequent tax payment is considered to be voluntary and therefore not recoverable in a tax refund proceeding absent formal written protest (see Tripler v Mayor, 125 NY 617, 625-626; Title Guarantee and Trust Co. v City of New York, 265 App Div 304, 306, *affd* 290 NY 910; Goldberg v City of New York, 260 App Div 61, *affd* 285 NY 705). The cases relied upon by the general class are distinguishable on their facts since they involved situations where either actual protest had been made, a lawsuit had been commenced, or there was an immediate threat of loss of business or use of property. The fact that there is a lien against the real property until the tax is paid is not the kind of duress which makes the tax payment involuntary and therefore excused from any requirement of formal protest. If it were, there would never be a need for any taxpayer to submit a written protest since virtually all real property taxes create liens upon the subject real property until they are paid.

EXHIBIT III

*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

Therefore, we hold that absent appropriate written protest, taxpayers of the City of Rochester are not entitled as a matter of legal right to a tax refund for the years in question.

Whether the city may nonetheless make these tax refund payments to non-protesters under the theory that such payments constitute equitable claims under section 20 (subd 5) of the General City Law is not now before us since Special Term specifically declined to rule on that issue. Absent such a ruling, this court will not entertain the issue for the first time on appeal (*Omowale v State of New York*, 72 AD2d 955, 955-956). We therefore remit the matter to Special Term for a determination of the legality of the payment by the City to non-protesters in the light of pertinent provisions of the Charter of the City of Rochester and whatever existing authorizing legislation there may have been (see generally 15 *McQuillin*, *Mun Corp* [3d ed], §39.20; 17 *id.*, §48.01; see also 17 *id.*, §§48.07, 48.17, 48.18, 49.07). We note that in the event Special Term should determine that such payments cannot be legally made, an order should be entered eliminating "new" Subclass D as hereinafter established.

As to the October 9, 1981 Certification Order, several points are raised on appeal. First of all, we agree with the Utilities that Special Term erred in dismissing their actions against the City for tax refunds. Special Term ordered dismissal of the Utilities' actions pursuant to CPLR 3211 (subd [a], par 4) on the ground that another action (i.e., the class action) was already pending between the parties. This was error. The Utilities' actions were commenced the same day that the City commenced the class action and therefore the class action cannot be said to have preceded the Utilities' actions (*Avery v Title Guarantee and Trust Co.*, 230 App Div 519; *Nacional Financiera, S.A. v Banco de Ponce*, 85 NYS2d 277, *affd* 275 App Div 832; 4

EXHIBIT III

*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

Weinstein-Korn-Miller, NY Civ Prac, par 3211.20). The proper procedure was for the court to join the Utilities' actions with the class action just as it did with several other actions which had already been commenced before the class action.

None of the parties question the propriety of maintaining this action as a class action except for the Utilities who do so only because of their contention that their actions should not have been dismissed. However, the form which the class action should take is another matter. Special Term appointed the Harter, Secrest and Emery law firm to represent the General Class of all taxpayers who paid taxes from 1974-1978. A separate Subclass A was established with separate counsel to represent those taxpayers who paid taxes under protest and who object to non-protesters receiving refunds. There is no subclass that represents only non-protesters. As matters stand now, there is an inherent conflict in Harter, Secrest and Emery representing the General Class of all taxpayers. If the City had the money to pay all the claimants — protesters and non-protesters alike — there would be no problem. At the moment, however, that is not the case. According to the City, there is only a limited fund available to pay claims and because of this, the City has recommended compromising the claims and settling the lawsuits for less than full payment. This may well set protester against non-protester especially in the light of our decision here which determines that only taxpayers who paid under protest are legally entitled to a refund. Harter, Secrest and Emery cannot represent "all" taxpayers when there is such an obvious conflict between at least two groups of those taxpayers. It is clear that a party cannot be an adequate class representative if he has a conflict with various class members. These conflicts are such that Special Term could have determined that the joinder of separate class actions was the best way to proceed. However, there is no fundamental error in

EXHIBIT III*Decision of Appellate Division,
Fourth Department, Decided April 12, 1982*

proceeding as one class action as long as the general class is divided into various subclasses (Siegel, NY Prac, §141, p 179). The court in a class action has broad powers to control the course of the litigation (CPLR 907; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 100). One way to overcome any potential conflict within members of the class is to create subclasses along the lines of the conflicting interests (2 Weinstein-Korn-Miller, NY Prac, par 906.03). Representation of the General Class should be eliminated and a new subclass created (Subclass D) consisting only of non-protestors with the opportunity afforded to them to establish their entitlement to a refund. In addition, Subclass A should be expanded to cover all protesters not merely those who protest and object to non-protesters receiving refunds. On remittal Special Term should also determine who the representatives of these subclasses should be and who their legal counsel should be. In this form, the General Class of all taxpayers will be divided into four subclasses: one that represents only protesters (Subclass A); one that represents taxpayers who sold their property since 1974 (Subclass B); one that represents taxpayers whose assessments have been reduced since 1974 (Subclass C) and one that would represent only non-protesters (a new Subclass D).

There is merit to having one representative and one lawyer or law firm oversee and manage the entire litigation on behalf of the defendant class. In its discretion, on remittitur, Special Term may determine that the Harter, Secrest and Emery firm should continue to represent the General Class in this fashion but if it does so, it should clearly define its duties and responsibilities.

We have considered the other issues raised as to both orders and find them to be without merit.

Dillon, P.J., Hancock, Doerr, Denman and Moule, JJ.
concur.

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EXHIBIT IV
ORDER OF THE APPELLATE DIVISION,
FOURTH DEPARTMENT, DATED APRIL 12, 1982

Form 3. DAILY RECORD CORP.

**SUPREME COURT OF THE
STATE OF NEW YORK**

Appellate Division, Fourth Judicial Department

**PRESENT: DILLON, P.J., HANCOCK, DOERR, DEN-
MAN, MOULE, JJ.**

City of Rochester,

Appellant,

v.

Angelo Chiarella, Real Estate Board of Rochester, New York,
Inc., and Midtown Holdings Corp., each individually and on
behalf of all payers of real property taxes to the City of
Rochester, for the fiscal years 1974-75 through 1977-78,
Respondents; Stephen J. and Charlene Sercu,

Appellants.

Appeal No. 2.

The above named City of Rochester and Stephen J. and
Charlene Sercu, subclass representatives for "Subclass A,"
each having appealed to this court from an order of the
Supreme Court entered in the Monroe County Clerk's office on
November 4, 1981, and said appeals having been argued by
Louis Kash of counsel for appellant City of Rochester, David
Angelone of counsel for appellants Sercu, Kenneth Payment of

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EXHIBIT IV

*Order of the Appellate Division,
Fourth Department, dated April 12, 1982*

counsel for General Class respondents, and submitted by Byron Johnson, amicus curiae for Subclass B defendants, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously reversed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings, in accordance with the same Opinion as in *City of Rochester v Chiarella*, Appeal No. 1, ____ AD2d ____, decided April 12, 1982.

Entered: APR 12 1982

MARY F. ZOLLER, *Clerk*

Supreme Court
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

(SEAL)

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this*

APR 12 1982

/s/ MARY F. ZOLLER

Clerk.

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EXHIBIT V
DECISION OF COURT OF APPEALS,
DECIDED MARCH 29, 1983

State of New York
Court of Appeals

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

4 No. 69

City of Rochester,

Respondent,

v.

Angelo Chiarella, et al.,

Appellants,

Stephen J. and Charlene Sercu,

Respondents.

(Quality Packaging Supply Corp., Arthur N. Bailey, McCrory
Corporation and Richard W. Katos,

Appellants.)

(69) Kenneth A. Payment, Rochester, for appellants Chiarella
et al.

Byron Johnson, Rochester, for appellants Quality Packaging
et al.

Louis N. Kash, Rochester Corporation Counsel, for respon-
dent City.

David J. Angelone, Rochester, for respondents Sercu.

John M. Wilson, Rochester, for Rochester area Chamber of
Commerce amicus curiae.

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EXHIBIT V
Decision of Court of Appeals,
decided March 29, 1983

WACHTLER, J.

Appellant is the representative of a subclass of real property owners in the City of Rochester whose property was assessed for real property taxes in excess of the tax limitations imposed by our State Constitution. Refunds are sought in the amount of the excess taxes paid pursuant to the unconstitutional levy for the tax years 1974-75 through 1977-78, although the taxpayers in the subclass had paid taxes for those years without protest. Special Term concluded that, under the circumstances of this case, the taxpayers' failure to protest payment of the excess taxes should not bar recovery. The Appellate Division reversed, holding that, absent appropriate protest or payment of the taxes under duress, these taxpayers are not entitled to refund of the excess taxes as a matter of legal right. There should be an affirmance.

The background of the present appeal begins with this court's decision in *Hurd v City of Buffalo* (34 NY2d 628, affg 41 AD2d 402). At issue in *Hurd* was a provision of the Local Finance Law which excepted from the 2% constitutional limitation on real property taxation (NY Const. art VIII, §10) taxes levied for pension and retirement benefits. Although the statute and the tax levied pursuant to it were held unconstitutional, retrospective relief was withheld, because the municipality had relied upon the statute in preparing its budget. Under the circumstances, "to mandate repayment of amounts illegally collected in the past would place an impossible burden upon [the municipality]" (41 AD2d at 406).

In response to the *Hurd* decision, the Legislature attempted, in successive enactments, to alleviate the fiscal crisis faced by municipalities and school districts caused by the limitations on their taxing authority. To this end, chapters 496 and 497 of the Laws of 1974 continued the exception from the constitutional

EXHIBIT V

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decided March 29, 1983*

limitation for pension and retirement benefits on a temporary, emergency basis. The same legislation established a temporary commission on constitutional tax limitations, which was to make recommendations for a more permanent solution to the local finance problem.¹ Thereafter, a proposed constitutional amendment to modify or repeal the real property taxing limitations was defeated by the voters.

The Legislature responded to this defeat by passing an additional enactment (L 1976 ch 349), again designed to allow certain municipalities and school districts to exclude pension and retirement benefits from the applicable constitutional tax limitations. Although the purpose of this legislation was stated to be the enactment of emergency provisions for the temporary solution of local finance problems, it was nevertheless held unconstitutional. As this court noted, this legislative effort amounted to "nothing more than an attempt to circumvent the constitutional limitation upon the amount of revenue that may be raised by local subdivisions of the State through taxation of real property" (*Bethlehem Steel Corp. v Board of Educ. Sch. Dist. of Lackawanna*, 44 NY2d 831,834, modfg 61 AD2d 147, app dsmd 439 US 922). However, unlike the situation in *Hurd*, where the municipalities had relied upon the statute authorizing the excessive levies, thus justifying the withholding of retroactive relief to the taxpayers, the municipalities in *Bethlehem Steel* had received ample notice, by virtue of the *Hurd* decision itself, that such a disregard of constitutional limits on their taxing authority would not be tolerated. Accordingly, we held that the taxpayers were entitled to establish their right to a refund of taxes paid in excess of the constitutional limitations "if such taxes were paid under appropriate protest" (*id* at 835).

¹The effectiveness of this enactment was later extended through fiscal year 1975-76 (L 1975, chs 322-325).

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The City of Rochester, acting pursuant to the legislation described above, had continued to levy real property taxes in excess of the constitutional limitations for the tax years 1974-75 through 1977-78. Many real property owners paid the excess taxes "under protest", but the taxpayers represented by appellant failed to register any protest to payment of their taxes. Following the decision in *Bethlehem Steel*, the City commenced this defendant class action against its taxpayers in order to prevent a multiplicity of separate lawsuits and to have all claims concerning the excessive levies resolved in one forum. Defendants interposed counterclaims on behalf of themselves and members of the class for refunds of the excess taxes paid. Special Term certified the class action, appointed class representatives and set down for threshold determination the issue of whether the nonprotesting taxpayers were entitled to recovery of the illegal taxes paid.² On the protest issue, Special Term ultimately concluded that the nonprotesting taxpayers are entitled to refunds, notwithstanding their failure to protest formally, because the imposition of a lien upon the real property and the exaction of interest for delinquent payment rendered the payments involuntary, thus excusing protest.³

²Special Term's initial order provisionally certified the class action, stayed commencement of additional lawsuits against the City and stayed the class action itself pending this court's decision in a related case (*Angelone v City of Rochester*, 72 AD2d 445, affd 52 NY2d 982). Following this court's affirmance in *Angelone*, Special Term ordered the City to submit a refund plan pursuant to the alternative prayer for relief in the City's complaint. The refund plan thereafter submitted proposed to refund one-half of the taxes illegally collected to all taxpayers, whether they protested or not. Although the City maintains that the nonprotestors are not entitled to refunds as a matter of legal right, it argued in the proceedings below that it may nevertheless recognize an equitable obligation to the nonprotestors pursuant to General City Law §20 (subd 5).

³Special Term's ruling on protest rendered unnecessary any consideration of the City's refund plan (see footnote 2, *supra*).

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The Appellate Division reversed, holding that the routine creation of a lien and the exaction of interest for nonpayment were insufficient to constitute the duress or coercion necessary to excuse the requirement of formal protest.⁴ The court also restructured the classes placing protestors and nonprotestors into separate subclasses, inasmuch as its determination of the protest issue rendered the interests of the two groups adverse.⁵ The Appellate Division then granted the nonprotestors leave to appeal to this court, certifying a question as to the correctness of its order concerning the protest issue.

The rules concerning the circumstances under which recovery of a payment made pursuant to an assessment later declared illegal may be had are well settled. Generally, the voluntary payment of a tax or fee may not be recovered (*Mercury Mach. Imp. Corp. v City of New York*, 3 NY2d 418, 424-425; *Adrico Realty Corp. v City of New York*, 250 NY 29; *Pooley v City of Buffalo*, 122 NY 592). When a payment is made under a mistake of law, with actual or constructive knowledge of the facts, as in the present case, it is incumbent upon the taxpayer to demonstrate that payment was made involuntarily (*Adrico Realty Corp. v City of New York*, *supra*).⁶ Payment of a tax under appropriate protest will ordinarily suffice to indicate the involuntary nature of the payment (*Mercury Mach. Imp. Corp.*

⁴The Appellate Division refused to consider the propriety of the City's refund plan for the first time on appeal. Accordingly, issues concerning that proposal are not before this court (see footnotes 2 and 3 *supra*).

⁵Thereafter, Special Term appointed provisional class representatives and counsel for the new subclasses for purposes of pursuing this appeal.

⁶Payments made pursuant to a mistake of fact often present different considerations (e.g., *Aetna Ins. Co. v Mayor of City of N.Y.*, 153 NY 331, *Brehm v Mayor of City of N.Y.*, 104 NY 186, 189; *Strusburgh v Mayor of City of N.Y.*, 87 NY 452, 456).

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v City of New York, supra, at p 425). The failure to register formal protest, however, will be excused in cases in which the payment is made under duress or coercion. The duress necessary to indicate involuntariness is present in circumstances where payment of a tax is necessary to avoid threatened interference with present liberty of person or immediate possession of property (*Mercury Mach. Imp. Corp. v City of New York, supra*, at p 425; *Tripler v Mayor of City of N.Y.*, 125 NY 617, 626-627; see *Five Boro Elec. Contrs. Assn. v City of New York*, 12 NY2d 146,150).

Although the test of involuntariness is easily stated, it is not quite as easy to apply. Recognizing that all governmental assessments are, in a sense, paid involuntarily, the determination is primarily one of degree, turning upon numerous factors, including: "The right of the taxing authorities to rely on objection if there be resistance to payment, the likelihood that authentic resistance will be asserted, the unavoidable drastic impact of the taxes or fees upon the claimant, and the impact on the public fisc, if revenues raised long ago and expended are subject to reimbursement" (*Paramount Film Distr. Corp. v State of New York*, 30 NY2d 415,420; cert denied 414 US 829).

Turning to the present case, it is urged on behalf of the non-protesting taxpayers that the circumstances under which the illegal taxes were paid demonstrate that the payments were coerced or involuntary. Pursuant to section 6-78 of the Charter of the City of Rochester, real property taxes become a lien on the property on the date they are levied (July 1). Although taxes are due on July 31, taxpayers are permitted to pay them in four installments; interest at an annual rate of 12% during the period in question is charged on delinquent payments. If the taxes remain unpaid, the lien may eventually be foreclosed and

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the property sold to satisfy the tax obligation. Moreover, under the standard mortgage, the mortgagee can require that the tax lien be removed to avoid a default on the mortgage. The nonprotestors maintain that payment of a tax to remove the cloud on title caused by the tax lien and to avoid interest charges is involuntary. The City contends that, in the absence of enforcement proceedings or the threat of the same, the payments should not be considered coerced. In its view, the routine tax lien does nothing more than provide a warning of record to prospective purchasers that property is carrying unpaid property taxes, and the interest exacted is at a level which is not exorbitant or excessive.

We agree with the City that, considering the circumstances under which the nonprotestors paid real property taxes for the tax years in question, the payments were not made in a manner indicating "authentic resistance" to the tax. The City had taken no steps to enforce the remedy available to it to compel payment, nor had it threatened to do so; therefore payments made merely to remove the routine lien and to avoid interest charged at a reasonable level were not necessary to prevent interference with immediate possession of the taxpayers' property. The method used by the City to compute real property taxes had been declared unlawful as early as 1974, putting all taxpayers on notice of the continuing possibility that taxes so levied, although pursuant to legislation, were constitutionally infirm. Yet, the nonprotestors continued to pay their taxes routinely and without resistance of any kind. It cannot be said that payments made under these circumstances were involuntary.

We recognize that there are cases indicating that duress may exist where an assessment is paid to remove a cloud on title and to halt the accrual of interest. In those cases, however, other

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factors were present further demonstrating the involuntary nature of the payments involved, including: the threat of proceedings to compel payment of the assessment (*Boris Leasing Corp. v City of New York*, 285 App Div 126, affd no opn 309 NY 682; see *Bruecher v Village of Port Chester*, 101 NY 240); the commencement by the taxpayer of proceedings to set aside or otherwise challenge the assessment before payment (*People ex rel. Wessell, Nickel & Gross v Craig*, 236 NY 100; *Pursell v Mayor of City of N.Y.*, 85 NY 330); or the filing of some form of actual protest to payment (*Adrico Realty Corp. v City of New York*, *supra*; *Effel Realty Corp. v City of New York*, 165 Misc 176; affd no opn, 256 App Div 972, affd no opn 282 NY 541). Moreover, the weight of more recent authority in this State is to the effect that imposition of a lien and/or exaction of interest, without more, falls short of what is to be recognized as duress in this context (see, e.g., *Riverdale Country School v City of New York*, 13 AD2d 103, affd no opn, 11 NY2d 741; *Title Guar. & Trust Co. v City of New York*, 265 App Div 304, affd no opn 290 NY 910; *Goldberg v City of New York*, 260 App Div 61, affd no opn 285 NY 705).

Although it is difficult to classify precisely the holdings in the numerous cases decided on the issues of involuntariness, an examination of the varying contexts in which they have arisen demonstrates that the ultimate resolution turns upon consideration of the totality of the circumstances surrounding a given payment. Where such consideration leads to the conclusion that a payment was made without any indication of authentic resistance, then the payment must be considered voluntary.

Accordingly, the order of the Appellate Division should be affirmed, and the certified question should be answered in the affirmative.

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Order affirmed, without costs, and question certified answered in the affirmative. Opinion by Judge Wachtler. Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg and Meyer concur. Judge Simons took no part.

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